

**LAW OFFICES OF MARC J. WODIN**

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PAMELA THOMPSON, Individually )  
and as Personal )  
Representative of CHARLES )  
THOMPSON, Deceased, )  
Plaintiff, )  
vs. )  
CONSECO SENIOR HEALTH )  
INSURANCE COMPANY, a )  
Pennsylvania corporation, )  
DOES 1 through XX )  
Defendant(s). )

CASE NO.: C 07-05437 PJH

[Sonoma County Superior  
Court Case No. 241544]

**NOTICE OF MOTION AND MOTION  
TO DISMISS PURSUANT TO FRCP  
12(b) (6) ; MEMORANDUM OF  
POINTS AND AUTHORITIES**

**DATE: March 19, 2008**

**TIME: 9:00 a.m.**

**CTRM: 3,17<sup>th</sup> Floor**

Assigned to: The Honorable  
Phyllis J. Hamilton

**TO: THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA AND TO THE INTERESTED PARTIES AND THEIR ATTORNEYS OF  
RECORD:**

Please take notice that on March 19, 2008, at 9:00 a.m. in  
Courtroom 3, 17<sup>th</sup> Floor, of the above entitled court located  
at the U.S. Courthouse, 450 Golden Gate Avenue, San Francisco,  
California, defendant Conseco Senior Health Insurance Company  
("defendant") will move the court for an order dismissing Pamela  
Thompson, insofar as she is suing individually, i.e. in her own

1 right, on the third claim for violation of Welfare and  
2 Institutions Code §§15600.

3 Said motion will be made pursuant to FRCP 12(b)(6), on the  
4 ground that said claim does not state a claim on which relief can  
5 be granted.

6 Said motion will be based on this notice, the pleadings,  
7 records and documents on file in this action, the memorandum of  
8 points and authorities served and filed herewith, as well as such  
9 oral and documentary evidence as may be presented at the time of  
10 the hearing of the motion.

11  
12 DATED: 2/11/08

LAW OFFICES OF MARC J. WODIN

13  
14 By           /S/ Marc J. Wodin            
15 MARC J. WODIN  
16 Attorneys for Defendants CONSECO  
17 SENIOR HEALTH INSURANCE COMPANY,  
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## MEMORANDUM OF POINTS AND AUTHORITIES

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2  
3 1. Pamela Thompson has no claim, in her own right, for financial  
4 elder abuse.<sup>1</sup>

5  
6 (1) Introduction: History related to the prior motion to  
7 dismiss and nature of plaintiff's allegations of elder abuse in  
8 the first amended complaint.

9 Plaintiff Pamela Thompson previously filed a complaint, in  
10 which she sought to proceed on claims for breach of contract, bad  
11 faith, and elder abuse, both as representative of Charles  
12 Thompson, and in her own right. See complaint

13 The complaint alleged that Charles Thompson was insured  
14 under an insurance contract issued to him by defendant, which was  
15 attached as an exhibit to the complaint, and that defendant acted  
16 wrongfully in withholding benefits due thereunder. See complaint.

17 Defendant brought a motion to dismiss the complaint of  
18 Pamela Thompson, insofar as she was seeking to proceed as a  
19 plaintiff in her own right, on the ground that she had no  
20 standing to sue in such capacity on those claims. Under  
21 California law, a non-party to an insurance contract has no  
22 standing to enforce it, or recover extra-contractual damages, for  
23 the wrongful withholding of benefits. The insurance contract was  
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26 <sup>1</sup>This motion is only directed at Pamela Thompson's attempt  
27 to proceed on a claim for elder abuse, as a plaintiff,  
28 "individually," i.e. in her own right, and is not directed at her  
attempt to proceed on a claim for elder abuse, in her capacity as  
representative of Charles Thompson, deceased, to recover for  
elder abuse which defendant allegedly committed against him.

1 issued to Charles Thompson, who was the owner and insured, and  
2 the only one entitled to contractual benefits. Pamela Thompson  
3 was not a party to the contract, and was not entitled to  
4 contractual benefits. See motion to dismiss.

5 The court granted the motion as to the claims for breach of  
6 contract and bad faith, and dismissed Pamela Thompson as a  
7 plaintiff on those claims. See Order re Motion to Dismiss.

8 The court denied the motion as to the claim for elder abuse,  
9 because it was pled so tersely and vaguely, that it was not clear  
10 whether it was, like the other claims, based on the withholding  
11 of benefits under the insurance contract, or had some other  
12 factual basis ("the claim appears not to be one on the insurance  
13 contract, though this is far from clear from the pleading of the  
14 claim"). However, because of this lack of clarity as to the  
15 factual basis for the claim, the court dismissed the claim as  
16 being "not sufficient under Federal Rule of Civil Procedure 8(a)  
17 to put [defendant] on notice as to what type of elder abuse claim  
18 is being asserted, and what facts support the claim." The Court  
19 granted leave to amend this claim. See Order re Motion to  
20 Dismiss.

21 Plaintiff has now filed a first amended complaint ("FAC"),  
22 in which Pamela Thompson again claims to be a plaintiff, in her  
23 own right, on the claim for elder abuse. Further, she now  
24 specifically alleges that the factual basis for this claim is,  
25 indeed, the same as for the other claims - the withholding of  
26 benefits allegedly due under the insurance contract.

27 In that regard, she first, in paragraph 15 of the FAC,  
28 incorporates allegations from the prior claims, in which it is

1 alleged that: Charles Thompson purchased and was insured under a  
2 long term care insurance contract issued by defendant to Charles  
3 Thompson, and which is attached as an Exhibit to the FAC. (FAC,  
4 paras 5-6 and Exhibit A to FAC)<sup>2</sup> In or about April 2005, Charles  
5 Thompson became entitled to benefits under the policy. (FAC,  
6 paras. 6-7) Defendant wrongfully withheld benefits due thereunder  
7 (FAC, paras. 7, 9) Charles Thompson died on June 8, 2007, and  
8 Pamela Thompson is his representative/successor. (FAC, caption,  
9 title of claim and para. 10)

10 She then alleges, in paragraph 16 of the FAC, that defendant  
11 committed elder abuse by withholding benefits on his claim, after  
12 it had accepted the premiums which he paid to purchase the  
13 policy. ("It was obvious to any reasonable person that benefits  
14 were payable under the policy. as described above. Thus,  
15 Defendant's failure to pay under the policy constituted financial  
16 abuse. . ." )

17  
18 **(2) Because it is now clear that the claim for elder abuse**  
19 **is based on the withholding of benefits under the insurance**  
20 **contract, Pamela Thompson has no standing to proceed on that**  
21 **claim, in her own right, any more than she had standing to sue,**  
22 **in her own right on the other claims.**

23 As noted in defendant's prior motion to dismiss, it has been  
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25 <sup>2</sup> The insurance contract was attached as an exhibit to the  
26 complaint. It is alleged to be attached as an exhibit to the FAC,  
27 (see para. 5) but was not attached in the filing. Defendant's  
28 attorney brought this to the attention of plaintiff's attorney,  
who advised that the omission was inadvertent, and who then filed  
the exhibit separately. Wodin Dec.

1 the law in California, for many years, that a non-party to an  
 2 insurance contract, has no standing to enforce it or recover  
 3 extra-contractual damages, for the wrongful withholding of  
 4 benefits. Seretti v. Superior National Insurance Co. (1999) 71  
 5 Cal.App. 4<sup>th</sup> 920, 930 ("[S]omeone who is not a party to the  
 6 contract has no standing to enforce it or recover extra-  
 7 contractual damages for the wrongful withholding of benefits" -  
 8 affirming an order sustaining defendants' demurrer, where a  
 9 person, who was not a party to the insurance contract, sought to  
 10 sue the insurer in contract and tort for wrongful denial of  
 11 benefits); Jones v. Aetna Casualty and Surety Co. (1994) 26  
 12 Cal.App. 4<sup>th</sup> 1717, 1722 (same); Hatchwell v. Blue Shield of  
 13 California (1988) 198 Cal. App. 3d 1027, 1034 (same) <sup>3</sup>

14 That is logical. A person who is not a party to an insurance  
 15 contract - who is not the owner or insured, entitled to benefits  
 16 of the contract - should not reasonably be accorded standing to  
 17 sue, in her own right, to enforce the policy or recover  
 18 extracontractual damages, based on the wrongful withholding of  
 19 benefits under the contract. Such standing should reasonably be  
 20 accorded only to the contracted party, himself, or, if he is  
 21 deceased or incapacitated, through a representative.

22 Pamela Thompson is not a party to the insurance contract,  
 23 and is not entitled to benefits thereunder. See FAC, paras. 5-7,  
 24

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25 <sup>3</sup> Further, "a non-party who is nevertheless entitled to  
 26 policy benefits, such as an insured person under the terms of the  
 27 policy, or an express beneficiary, has standing only if he or she  
 28 is the *claimant* whose benefits are wrongfully withheld." Seretti,  
 supra, p. 930, and Jones, supra, p. 1722, citing Hatchwell,  
 supra

1 and Exhibit A to FAC. She has no standing to bring a claim, in  
2 her own right, for the alleged wrongful withholding of benefits  
3 under the insurance contract. Now that it is clear that the claim  
4 for elder abuse is, like the previous claims, based on an  
5 allegation that defendant wrongfully withheld benefits under that  
6 contract, her claim is barred, just like the previous claims.

7 Further, the fact that the claim for elder abuse is a  
8 statutory, rather than a common law claim, does not change this  
9 result. A statute is to be construed in light of the common law,  
10 unless its language clearly and unequivocally discloses  
11 otherwise. Catholic Mutual Relief Society v. Superior Court  
12 (2007) 42 Cal. 4<sup>th</sup> 358, 372 ("[U]nless expressly provided,  
13 statutes should not be interpreted to alter the common law, and  
14 should not be construed to avoid conflict with common law rules.  
15 'A statute will be construed in light of common law decisions,  
16 unless its language clearly and unequivocally discloses and  
17 intention to depart from, alter or abrogate the common law rule  
18 concerning the particular subject matter.'")

19 Thus, unless the elder abuse statute "clearly and  
20 unequivocally" abrogates this rule, and says that a non-party to  
21 the insurance contract does have standing, acting in his or her  
22 own right, to enforce it, and recover extra-contractual damages,  
23 for the wrongful withholding of benefits, she has no standing to  
24 proceed on such a basis.

25 It does not do so, and she cannot proceed on any such basis.

26 The financial elder abuse statute, appears as Welfare and  
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28

1 Institutions Code §15610.30.<sup>4</sup>

2 Preliminarily, by the express language of the statute,  
3 financial elder abuse only applies to abuse of elders or  
4 dependent adults. Therefore, if Pamela Thompson is seeking to  
5 recover for elder abuse in her own right, she must either qualify  
6 as an elder or dependent adult, terms which are specifically  
7 defined by statute.<sup>5</sup> There is no allegation in the FAC, that she

8  
9 <sup>4</sup>  
10 (a) 'Financial abuse' of an elder or dependent adult occurs when a  
11 person or entity does any of the following:

12 (1) Takes, secretes, appropriates, or retains real or  
13 personal property of an elder or dependent adult to a wrongful  
14 use or with intent to defraud, or both.

15 (2) Assists in taking, secreting, appropriating, or  
16 retaining real or personal property of an elder or dependent  
17 adult to a wrongful use or with intent to defraud, or both.

18 (b) A person or entity shall be deemed to have taken, secreted,  
19 appropriated, or retained property for a wrongful use if, among  
20 other things, the person or entity takes, secretes, appropriates  
21 or retains possession of property in bad faith.

22 (1) A person or entity shall be deemed to have acted in bad  
23 faith if the person or entity knew or should have known that the  
24 elder or dependent adult had the right to have the property  
25 transferred or made readily available to the elder or dependent  
or to his or her representative.

(2) For purposes of this section, a person or entity should  
have know of a right specified in paragraph (1) if, on the basis  
of the information received by the person or entity or the person  
or entity's authorized third party, or both, it is obvious to a  
reasonable person that th elder or dependent adult has a right  
specified in paragraph (1).

(c) For purposes of this section, 'representative' means a person  
or entity that is either of the following:

(1) A conservator, trustee, or other representative of the  
of the estate of an elder or dependent adult.

(2) An attorney-in-fact- of an elder or dependent adult who  
acts within the authority of the power of attorney.

26 <sup>5</sup> Indeed, as a preliminary, but essential matter, the  
27 complaint does not even allege facts that show that Pamela  
28 Thompson qualifies as a elder or dependent adult, entitled to  
bring a claim for anything under the statute. As noted, in order  
to bring a claim under the statute, one must be an elder or



1 is either.

2 Second, she could not recover in her own right even if she  
3 did so qualify. The statute nowhere purports to abrogate the  
4 above noted common law rule that a non-party to an insurance  
5 contract has no standing to enforce it or recover extra-  
6 contractual damages, for the wrongful withholding of benefits,  
7 which, as noted, is the factual basis for the claim involved in  
8 this case. It nowhere says that a person, who is not a party to  
9 an insurance contract, can bring an action, in his her own right,  
10 to enforce the contract or recover extracontractual damages,  
11 based on the withholding of benefits.

12  
13 DATED: February 11, 2008

LAW OFFICES OF MARC J. WODIN

14  
15 By /s/ Marc J. Wodin  
16 MARC J. WODIN  
17 Attorneys for Defendant CONSECO  
18 SENIOR HEALTH INSURANCE COMPANY  
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23 dependent adult. An "elder" is a "person residing in this state,  
24 65 years or older." Welfare and Institutions Code Section  
25 16510.27 A "dependent adult" is a "person between the ages of 18  
26 and 64 years who resides in this state and who has physical or  
27 mental limitations that restrict his or her ability to carry out  
28 normal activities or to protect his or her rights, including but  
not limited to person who have physical or developmental  
disability, or whose physical or mental abilities have diminished  
because of age." There is no allegation that she meets either of  
these requirements.

**DECLARATION OF MARC J. WODIN**

I, MARC J. WODIN, DECLARE:

1. The facts set forth herein are personally known to declarant, who has firsthand knowledge of the same, and if called as a witness, said declarant could and would competently testify thereto under oath.

2. I am an attorney duly admitted to practice before this court, and I am a principal in the Law Offices of Marc J. Wodin, attorneys of record for defendant Conseco Senior Health Insurance Company in the above entitled action.

3. On February 4, 2008, I noticed that the insurance contract, which had been attached as an exhibit to the complaint, and which was referenced as being attached as an exhibit to the first amended complaint was not, in fact, attached as an exhibit. I promptly wrote to plaintiff's attorney, advising him of this fact, and asked him to correct it. I was advised that the correction would be made and that the first amended complaint would be filed as a separate document. On February 11, 2008, I received a call from plaintiff attorney's office advising me that the first amended complaint had been filed. I also received a notification from the court indicating that it had, in fact,

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1 been filed on February 11, 2008.

2  
3 I declare under penalty of perjury under the laws of the  
4 United States of America that the foregoing is true and correct.

5  
6 Executed this 11<sup>th</sup> day of February, 2008, at Woodland Hills,  
7 California

8  
9 /S/ Marc J. Wodin  
10 MARC J. WODIN  
11 DECLARANT  
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